In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 71-1692

D.D.I., INC., ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioners seek review of the decision of the Court of Claims dismissing their suits for refund of income taxes paid pursuant to a statutory compromise.

1. After audit of the petitioners' tax returns for the years 1960 through 1964, the Commissioner of Internal Revenue proposed to assess additional income taxes against petitioners pursuant to Section 531 of the Internal Revenue Code of 1954, 26 U.S.C. 531. The parties later agreed, however, to hold the contested years "in suspense" pending the outcome of refund suits filed by three other corporate taxpayers which involved identical facts and circumstances. While those refund suits were pending, on April 16, 1968 counsel for those taxpayers (who also was counsel for petitioners) proposed to the Assistant Attorney General that their suits be settled for 25 percent of the amount of taxes and

interest in dispute. That offer was conditioned, however, on the cases of these petitioners being settled at the same time and on the same basis. On December 17, 1968, that offer was accepted by the Attorney General, subject to the same condition. On February 17, 1969, petitioners executed Internal Revenue Service Forms 870 reflecting liabilities determined on the basis of this agreement, and petitioners paid the amounts shown on those forms. The pending refund suits were then dismissed by stipulation.

A subsequent unrelated decision of the Court of Claims held that interest on Section 531 tax liabilities runs only from the date of assessment and not from the earlier date on which the tax return was due to be filed, as provided in petitioners' settlement agreement. *Motor Fuel Carriers, Inc.* v. *United States,* 420 F. 2d 702. Following this decision, petitioners filed claims for refund of part of the interest previously paid by them pursuant to the settlement. Upon denial of those claims, petitioners brought this refund suit. The court below held that petitioners' suit was barred both by the settlement agreement and by principles of estoppel.

2. Petitioners first contend that, because their liabilities were not in litigation, the Court of Claims erred in holding that the settlement with the Attorney General was a valid compromise binding upon them under Section 7122 of the Internal Revenue Code. They base that argument upon the fact that the statute does not expressly authorize the Attorney General to compromise cases not yet referred to the Justice Department for litigation. But the same counsel represented both petitioners and the taxpayers whose cases were then in litigation, and he refused to settle those pending cases without reaching settlement with respect to petitioners

as well; in these circumstances, as the court below correctly noted (Pet. App. 4), the Attorney General had authority to settle petitioners' liabilities as matters "germane" to cases in litigation. 38 Op. Atty. Gen. 98, 102.[1]

3. As the court below correctly ruled (Pet. App. 5-7), even assuming that execution of the Forms 870 fell short of a binding settlement agreement, petitioners were, in any event, estopped from claiming a refund because they had used the settlement procedures to induce the Attorney General to enter into a compromise with other taxpayers whose tax years accordingly became barred against further assessments. As this Court observed in *Botany Mills* v. *United States*, 278 U.S. 282, 289, although an administrative settlement of a tax dispute (such as a Form 870 agreement, without more) does not bar a subsequent refund suit, the doctrine of estoppel bars such a suit in appropriate circumstances. The circumstances here were appropriate to create an estoppel: petitioners' representation that they would settle their liabilities induced the government to forego further litigation respecting deficiencies assessed

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[1] Petitioners contend (Pet. 8) that the decision below "conflicts in principle" with *Brubaker* v. *United States*, 342 F. 2d 655 (C.A. 7). There is no conflict. That case merely involved the question whether the settlement of a renegotiation liability necessarily covered an excess profits tax liability as well. In holding that the excess profits tax liability, which was nowhere mentioned in the settlement agreement, was not covered, the court reasoned that the Attorney General had lacked authority to settle that liability because it was not germane to the renegotiation controversy. However, the taxpayer there had not insisted upon mutual settlement of the two liabilities and thus had not made them germane to one another.

against taxpayers represented by the same counsel and to permit the statute to run as to those taxpayers.[2]

Petitioners contend (Pet. 12-13) that the government could not have relied to its detriment because it knew that it was not bound by the Form 870 settlement agreement. But in view of the fact that the settlement with petitioners was related to the binding settlement agreement between other taxpayers and the Attorney General, it is at least doubtful that the government could have disavowed the Form 870 agreement.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

AUGUST 1973.

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[2]Petitioners also suggest that the decision below conflicts in principle with *Unita Livestock Corp.* v. *United States*, 355 F. 2d 761 (C.A. 10), *Bank of New York* v. *United States*, 170 F. 2d 20 (C.A. 3), and *Joyce* v. *Gentsch*, 141 F. 2d 891 (C.A. 6). However, those cases simply involve factually distinguishable circumstances where the government's reliance was deemed insufficient to raise an estoppel.